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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

NO. 72-900

FLOYD E. McDOWELL,

Petitioner,

vs.

TEXAS BOARD OF MENTAL HEALTH AND MENTAL RETARDATION, ET AL,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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NATURE OF THE CASE

This is a suit for damages by a former employee of the State of Texas Board of Mental Health and Mental Retardation. The District Court and the U. S. Court of Appeals for the Fifth Circuit dismissed the case because no federal question was involved and because the evidence clearly showed that McDowell's dismissal resulted from inefficiency, incompetency and insubordination, *McDowell* v. *Texas Board of Mental Health and Mental Retardation, et al.*, 465F.2d 1342 (5th Cir. 1972).

STATEMENT OF FACTS

Petitioner McDowell, herein called Plaintiff, was hired by Respondents, herein called Defendants, under a Texas statute (Article 691, Vernon's Texas Civil Statutes) which provided that Defendants were "vested with full authority and discretion to terminate the employment of any such superintendent at any time".

Defendants' answer and the evidence shows that Plaintiff's employment was terminated as the result of a culmination of events that had taken place over a two-year period. (A.109,125)

After Plaintiff had been discharged, he made the following statement to the press:

> "Looking back on it, I have refused to follow some orders and administrative practices. I am amazed I stayed so long." (A. 80,84)

Plaintiff was discharged for inefficiency, incompetency and insubordination. Eleven reasons for his discharge were set out in Defendants' answer. (A. 5,6) When he was first employed, he refused to prepare a grant although he was ordered to prepare it by Defendant Barnett. (A. 71,106) Barnett was Deputy Commissioner of the Board of Mental Health and Mental Retardation and was Plaintiff's supervisor. Contrary to instructions, Plaintiff employed persons for whom there were no job classifications. (A. 72) He employed unqualified persons. (A. 72)

He refused to follow instructions from the central office. (A. 74) Plaintiff left his former job in Florida because he refused to follow the instructions of his superiors. (A. 69) He failed to properly prepare his budget. (A. 47,76) He refused to cooperate with the Texas Research for Mental Sciences. (A. 48, 73, 74)

Where there were no classified positions open, he hired consultants. (A. 73) He was openly critical of the central office. (A. 76, 97, 98) He openly disagreed with the policies of his superiors. (A. 30, 31, 97) Defendant Barnett told Plaintiff to pack his bags if he could not follow directions and instructions from the central office. (A. 75,107)

Defendant Barnett was the Deputy Commissioner of the Mental Health and Mental Retardation Department and had the final power to admit retarded children in any State school. Wyatt Connally, a mongolid child, was eligible for admission to Richmond State School. (A. 42, 93) Plaintiff refused to admit this child even though ordered to do so by Deputy Commissioner Barnett. (A. 84, 106) Plaintiff said he would not admit the Connally child regardless of what the Central Office said; the evidence showed that he was a State employee and subject to the control of Defendants. (A. 29)

Plaintiff was called to Austin by the Central Office in November of 1967 and his deficiencies and insubordination were discussed. (A. 36,75,76) He was again called to Austin in May of 1968 and his failure to follow instructions and directions from the Central Office were again discussed. (A. 46, 48, 76, 77) He was looking for another job long before he was fired. (A. 78,79) He was immediately reemployed in a better paying job. (A. 80,81) The evidence showed that he was reemployed within eight working days after he was fired; that he had twenty jobs offered and was immediately employed at an annual salary of $20,000 which was increased to $22,500. (A. 80,81) His compensation at the Richmond State School was only $18,000 per annum. (A. 63,64)

Defendants were told by David Sloane that Plaintiff

had called Defendants Barnett and Kinross-Wright sons of bitches at a public meeting. (A. 103, 104)

Plaintiff was discharged because of his attitude and in culmination of a long series of events that had taken place over a two-year period of time. (A. 109,125) At the time of his firing, Plaintiff talked with the Defendants around fifteen minutes but at the time of the trial he didn't remember what was said in this conversation. (A. 51)

At the conclusion of the testimony, Plaintiff admitted there was nothing to submit to the jury. (A. 122) The trial judge correctly held that no federal question was involved .(A. 126)

In this case there is no question of tenure or of expectancy of continuing employment. The U. S. Court of Appeals for the Fifth Circuit, in its opinion of May 6, 1971, held as follows:

> "The record is devoid, however, of any evidence that Dr. McDowell had such an expectancy of reemployment." (P. 10)
>
> "Under the circumstances of this case, no federal constitutional right to a trial type hearing existed." (P. 13)
>
> "Unlike Dr. Ferguson, Dr. McDowell had no expectancy of reemployment. Unlike Sindermann or Battle, he asserted no deprivation of specific constitutional rights." (P. 14)

ARGUMENT AND AUTHORITIES

Under the facts in this case, both the trial court and the U. S. Court of Appeals correctly held that the pleadings and the evidence presented no federal question and that the state questions were solely within the ambit of state control. *Johnson* vs. *Hood,* 430 F.2d 610 (5th Cir., 1970).

In *Freeman* v. *Gould Special School District of Lincoln County, Ark.*, 405 F.2d 1153 (8th Cir., 1969), the Court held that in the absence of statutory contractual requirements, public school teachers discharged for inefficiency, incompetency, or insubordination have no constitutional right to a hearing with rights of cross-examination and confrontation of witnesses.

In *Bailey* v. *Richardson*, 182 F.2d 46 (D. C. Cir., 1950), affirmed 71 S.Ct. 669 (1951), it was held that in the absence of a statute or custom to the contrary, executive offices are held at the will of the appointing authority and that a State employee has no constitutional right to a hearing where no constitutional rights are involved.

The *McDowell* case was tried before the appellate decision was rendered in *Ferguson* v. *Thomas, et al*, 430 F.2d 852 (5th Cir. 1970). However, the *Ferguson* case expressly holds that an employee is afforded due process by a trial in the U. S. District Court where the charges against him are made known and he has the right to present his case, take depositions, and cross-examine the witness. At 430 F.2d 858 the Court held as follows:

> "In the court below, Dr. Ferguson was allowed to depose witnesses in advance of the hearing and to call and cross-examine all witnesses he chose to call or cross-examine relative to the procedures followed in, as well as the merits of, terminating his services. Included in this group of witnesses were both of the men Dr. Ferguson wanted to present to the Board. Each and both of these administrators testified in the court below to even more damaging facts than those President Thomas presented to the Board. The department head who Dr. Ferguson was so anxious to call described him as a svengali who courted favor with the students at

the expense of their education, then used the influ
ence and power gained with the students as
threat against anyone who confronted him con
cerning matters of discipline or academic excel
lence. This condition intimidated the departmen
head to the extent that some of his open criticism
of Dr. Ferguson were very much milder than hi
true feelings warranted (a condition which evi
dently badly mislead Dr. Ferguson).

"Since the very witnesses Dr. Ferguson wanted
to present have now testified and it is clear from
their testimony that they would have greatly en
hanced the basis of the Board's action in affirm
ing his termination, it is not necessary for this
cause to be remanded to the district court for re
ferral back to the school board. Justice and fair
ness to all parties indicates that his termination
may be affirmed here and now."

As in the *Ferguson* case, the evidence presented in the Trial Court proved conclusively that McDowell was discharged for cause under the state law and that no federal question was presented by the facts. In *Sindermann* v. *Perry*, 430 F.2d 939 (5th Cir. 1970) this Court expressly held that where there was no expectancy of reemployment, as in the McDowell case the burden was on McDowell to prove that Defendants were wrong in not continuing his employment. The evidence presented in this case clearly shows that McDowell's employment was terminated for adequate cause, as in the Ferguson case, and he failed to prove any wrongful conduct on the part of Defendants either before or during the trial of this cause in the U. S. District Court.

Appellant McDowell was fired because of his incompetency, his inefficiency and his refusal to follow Defendants' instructions over the entire period of his employment. No federal question is involved in this case.

McDowell had no tenure or expectancy of reemployment and he was fired for adequate cause. He has fully presented his side of the case in the Trial Court. After concluding his evidence he admitted he had nothing to present to the jury. In all fairness, and under the applicable law, the action of the Texas Department of Mental Health and Mental Retardation and its officials in terminating McDowell's employment should be upheld.

In affirming the dismissal of Plaintiff's case, the fifteen Federal Judges for the Fifth Circuit correctly held as follows:

> "PER CURIAM: Subsequent to en banc briefing, argument and reconsideration of this cause, the Supreme Court decided Board of Regents of State Colleges v. Roth, —— U.S. ——— (1972) [40 L.W. 5079, June 29, 1972], and Perry v. Sindermann, —— U.S. ——— (1972) [40 L.W. 5087, June 29, 1972], which review and distill the rules of procedural due process in State employment situations. These decisions make it clear that the opinion of the panel was correct and it is adopted as the opinion of the court en banc." (465 F.2d 1349).

CONCLUSION

The Court of Appeals for the Fifth Circuit is in all things correct and the petition for a writ of certiorari should be refused.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Jack Sparks, Assistant Attorney General of Texas, am a member of the Bar of the Supreme Court of the United States, and I do hereby certify that three copies of the foregoing brief have been forwarded by U. S. Mail, postage prepaid, to the attorney for Petitioner, David R. Richards, Clinton & Richards, 600 West 7th Street, Austin, Texas 78701.

JACK SPARKS